See Also: The Federalist Society: Hijacking Justice, by George Curry & Trevor Coleman, *Emerge,* October 1999

The following is mirrored from its source at: http://www.pfaw.org/pfaw/general/default.aspx?oid=652

The Federalist Society: From Obscurity to Power

The Right-Wing Lawyers Who Are Shaping The Bush Administration's Decisions On Legal Policies and Judicial Nominations

A Report by the People For the American Way Foundation

August 2001

Contents

- Introduction
- Right-Wingers of a Feather
- Key Sources of Funding
- Undeniably Ideological
- From Network to Policy
- "Federalist" Principles vs. Federalist Authority
- "Federalist" Principles vs. Equal Opportunity & Constitutional Rights
- Case Study: Ending ABA Review of Judicial Nominees
- Seizing the Day: The Federalist Society and the Federal Courts
- Opening Round: The Courts of Appeals
- Plotting an Extreme Course
- Appendix A: Federalist Society Members in the Bush Administration

- Appendix B: Other High Profile People
  Who Belong to or Are Affiliated with the Federalist Society

- End Notes

Introduction

When President George W. Bush took office, many pundits predicted that his narrow margin of victory, his loss of the popular vote, and his moderate-sounding campaign would lead him to govern from the political center. Yet Bush began almost immediately to confound this prediction with a series of actions -- especially in the areas of family planning, the environment, and nominations -- that seemed to have been taken directly from the right wing's playbook. Within just a few months after the new president took office, pundits and political observers were eating their earlier words, now noting that Bush was building the "most conservative administration in modern times." [1] Right-wing groups have voiced great pleasure at President Bush's efforts to assemble a team that one ultra-conservative leader described as "more Reaganite than the Reagan administration." [2]

Early predictions of moderation proved wrong largely because observers failed to take into account a very important factor: President Bush's reliance for policy and staffing decisions on members of key right-wing organizations, notably the Federalist Society for Law and Public Policy Studies. When President Bush broke his campaign promise to regulate carbon dioxide emissions, that decision was based on a controversial report requested by one of the Society's founding members. [3] When right-wing leaders attacked the potential nomination of conservative Montana Governor Marc Racicot to be attorney general, it was a leading Federalist Society activist who wrote the memorandum that proved critical in torpedoing Racicot's hopes. [4] In the end, the post went instead to former Senator John Ashcroft, an extreme conservative and Society member. Today, many Society members are working in the White House counsel's office, at the top levels of the Department of Justice and in other high administration posts. [5]

Not yet 20 years old, the Federalist Society exerts a powerful influence. Despite its protestations that it is little more than a debating society, media from across the political spectrum agree that the organization carries tremendous clout. *The Washington Times' Insight* magazine identified the group as the "single most influential organization in the conservative legal world." [6] An article in *Washington Monthly* identified the Society as "quite simply the best-organized, best-funded, and most

effective legal network operating in this country. . . . There is nothing like the Federalist Society on the left." [7]

The Society's status is reflected in the list of people who are members of, or otherwise affiliated with it. This list includes: Attorney General John Ashcroft; Department of Energy Secretary Spencer Abraham; Department of the Interior Secretary Gail Norton; Senator Orrin Hatch, the ranking Republican on the powerful Senate Judiciary Committee; Solicitor General Theodore Olson; former Independent Counsel Kenneth Starr; and former Christian Coalition President Donald Hodel, who also served as secretary of the Energy and Interior departments under President Reagan (see Appendices for a more extensive list). [8]

There is nothing illegal or unethical about an administration being so heavily staffed and influenced by individuals who are affiliated with a single organization. However, the American people deserve to be fully informed about any organization that has assumed such a central role in shaping policies and determining appointees for the Bush administration. Contrary to the charges of Federalist Society members, there is nothing inappropriate or McCarthyite about such an effort to inform the public. Indeed, if the organization in question were People For the American Way, it's a safe bet that Federalist Society members themselves would be vigorously arguing that Americans should closely examine the values and goals that guide the organization.

To better inform the public debate, this report explores the Federalist Society and its members and allies -- examining their legal and policy objectives, their prevailing philosophy, as well as the kind of impact they could have through their influence within and outside the Bush administration on the law, the courts, the Constitution and ordinary citizens.

Right-Wingers of a Feather

Founded in 1982 by students at the Yale and University of Chicago law schools, the Federalist Society was initially nurtured by law professors such as Robert Bork and Antonin Scalia. [9] The Society served as a meeting ground for those who felt out of step with the perceived liberal bent of their schools' curriculum. To this day, the Society continues to attract lawyers, scholars and elected officials whose opinions closely parallel the right-wing views of Bork, Scalia, and Supreme Court Justice Clarence Thomas.

The Federalist Society is governed by a board of directors co-chaired by Steven Calabresi and David McIntosh, both of whom have strong ultra-conservative credentials. As a Yale law student, Calabresi founded one of the first Society chapters. Upon graduation, he went on to clerk for both

Robert Bork at the U.S. Court of Appeals for the District of Columbia Circuit and for Supreme Court Justice Antonin Scalia. He also served as a special assistant to Reagan Attorney General Edwin Meese III and as a speechwriter for Vice President Dan Quayle.

McIntosh followed a similar path, co-founding one of the Society's first chapters at the University of Chicago law school. McIntosh also served a stint as a special assistant to Meese and as special assistant and deputy legal counsel to Quayle. After his 1994 election to the U.S. House of Representatives from Indiana, McIntosh became a frequent ally of then-House Speaker Newt Gingrich. [10] McIntosh's congressional voting record was extremely conservative, exemplified by his July 28, 1995 vote to prohibit the Environmental Protection Agency from enforcing some sections of the Clean Air Act and the Clean Water Act. [11] McIntosh, who chaired a subcommittee on regulatory issues, confided to one reporter that he was surprised at the public's support for existing environmental laws. [12]

In addition to its board of directors, the Federalist Society has a board of visitors (formerly the board of trustees). [13] The Society's board of visitors includes Judge Bork and William Bradford Reynolds, President Reagan's assistant attorney general for civil rights who was so controversial that his 1985 nomination for promotion to associate attorney general was defeated by a Republican-led Senate Judiciary Committee. During his confirmation hearings, critics claimed that as head of the Justice Department's civil rights division, Reynolds had refused to enforce civil rights laws and ignored court rulings with which he disagreed. [14] Republican Senator Arlen Specter accused Reynolds of giving misleading testimony, "disregarding the established law," and "elevating [his] own legal judgments over the judgments of the courts." [15]

Bork has long been revered by his fellow Society members. Several months after the Senate defeated his 1987 Supreme Court bid by the largest margin in history, attendees at the Society's annual conference gave him four standing ovations -- and many of them wore "Reappoint Bork" buttons. [16]

A closer examination of the board of visitors shows the extent to which far-right views dominate the leadership of the Federalist Society. Virtually all of the board members are well-known, right-wing legal and political leaders or otherwise public supporters of radically conservative views. In addition to Bork and Reynolds, the roster includes Edwin Meese III, former White House counsel C. Boyden Gray, Senator Orrin Hatch, and former Christian Coalition leader Don Hodel. [17]

Less well known is board member Gerald Walpin, who has criticized the Supreme Court's 1966 Miranda decision for permitting "lawlessness" and has endorsed Congress' ability to set aside the ruling that obligates police to inform defendants of their rights to remain silent and to have access to legal counsel. [18] In materials on the Society's Web site, Walpin has also

assailed court precedents guaranteeing the rights of free speech and free expression. [19]

Also serving on the Society's board of visitors is University of Virginia law professor Lillian BeVier. In an article on privacy rights and the Supreme Court's 1973 Roe v. Wade decision, BeVier wrote that "the right of privacy that Roe protects" is "a perversion" of the Court's earlier rulings on privacy. [20] As applied to the right of reproductive choice, BeVier insisted that "the word `privacy' is not only unearned but positively misleading," calling the Roe decision the product of an "exercise of judicial power." [21] BeVier also sits on the advisory board of the right-wing Independent Women's Forum (IWF), which sponsored a panel discussion last year to lambaste the U.S. Civil Rights Commission -- a panel entitled: "Time to Decommission this Commission." [22] BeVier was nominated by the elder President Bush to be a judge on the U.S. Court of Appeals for the Fourth Circuit, but she never received a vote. [23]

Leading members of the Society are ed to serve on 15 "practice groups" that cover a wide range of issues such as separation of powers and federalism, free speech and election law, labor and employment law, religious liberties, environmental law, and civil rights. [24] The Society created its lawyers' division in 1986 for attorneys, business leaders, judges and others who shared three goals: educating the legal community about how the Society's ideas "can affect decisions in the legal and policy worlds"; building a network of lawyers to "exercise leadership in shaping national, state and local policy"; and "[c]ounterbalancing the leftward pressures that hold sway in the organized bar." [25]

Led by such individuals, the Federalist Society has grown substantially over the years. According to a January 2001 report by the Institute for Democracy Studies, the Society's membership includes over 40,000 lawyers, policy analysts, business leaders and others. In addition, the organization's membership includes 5,000 law students at roughly 140 law schools. [26]

Key Sources of Funding

The Federalist Society's standard membership fees -- $25 for lawyers and "standard members," $5 for law students and $10 for faculty -- account for a relatively small share of the organization's annual income. [27] Major contributors, both individuals and foundations, are recognized through the James Madison Club, whose namesake appears as the silhouetted profile in the Society's logo. The growing clout of the Society has been aided by millions of dollars from the likes of the John M. Olin, Lynde and Harry Bradley, Sarah Scaife, and Charles G. Koch foundations -- some of the largest funders of right-wing groups in the country. In 1998, all four of these foundations contributed at least $100,000 to the Federalist Society,

gifts that placed them in an elite group of eight top Society contributors. [28]

The Olin Foundation grew out of a family chemical and munitions manufacturing business. It routinely has funded ultra-conservative organizations such as the Heritage Foundation and the Manhattan Institute for Public Policy Research. Other organizations on the far right that have received support from Olin are the Center for Individual Rights, Citizens for a Sound Economy Foundation, Phyllis Schlafly's Eagle Forum, Focus on the Family, the Free Congress Foundation, the Independent Women's Forum, and the Institute for Justice. [29] The Olin Foundation was once headed by Michael Joyce, who later departed to head the Bradley Foundation. (The Olin Foundation has recently decided to disband in keeping with the wishes of its namesake, who feared that the foundation might someday be "captured by someone who didn't agree with his philosophy." [30])

The Bradley Foundation, which uses much of its financial resources to promote school vouchers and attack affirmative action and welfare programs, has a history of funding right-wing causes. It provided a grant to support David Brock's 1992 book The Real Anita Hill. [31] The book was designed to "ruin" Hill's reputation and remove lingering doubts about Thomas' fitness for the Supreme Court, but Brock has recently recanted the book's claims, admitting that right-wing activists encouraged him to work "virtually every derogatory -- and often contradictory -- allegation I had collected on Hill into the vituperative mix." [32]

The Bradley Foundation's Joyce defended the foundation's $100,000 grant to Charles Murray, who co-wrote the highly controversial 1994 book The Bell Curve. Murray's book was criticized widely by scholars as racist and statistically unsound. An earlier book that Murray wrote, Losing Ground, was also produced with financial backing from Joyce. In Losing Ground, Murray argued that poverty did not result from economic dislocation or discrimination, but from personal failings. In response to critics who assailed Murray's blame-the-victim view, Joyce praised Murray as "one of the foremost social thinkers in the country." [33] (This summer, Joyce left the Bradley Foundation and has formed a lobbying group to help push for congressional passage of President Bush's plan for government funding of religion, also known as faith-based initiatives. [34])

The Scaife Foundation has also funded the Federalist Society, along with a long list of other right-wing efforts. These include the American Spectator and its "Arkansas Project" -- a $2.4 million campaign to gather information for the expressed purpose of discrediting former President Bill Clinton and potentially forcing him out of office.

The Koch Foundation is one of three family foundations established by Charles G. Koch, the heir to Koch Industries, an oil refining and petrochemical company based in Wichita, Kansas. Koch Industries began as Rock Island Oil and Refining, built a generation ago by Fred Koch, who was also one of the founders of the John Birch Society. [35] In addition to

serving as chief executive officer of the company, Charles Koch is a co-founder of the Cato Institute, [36] a libertarian Washington, D.C.-based think-tank whose publications have downplayed the dangers of lead-based paint and asbestos, and proposed allowing states to choose "whether to accept any increase" in the minimum wage. [37]

The Koch Foundation supports right-wing causes at every level -- from academic research and the recruitment of young scholars to think tanks and "implementation" groups that attempt to turn these ideas into political realities. Among the other right-wing groups supported by the Koch Foundation are Citizens for a Sound Economy, the Institute for Justice, the American Legislative Exchange Council, the Reason Foundation, the Heritage Foundation, the Landmark Legal Foundation and the Young America's Foundation. [38]

Since 1985, the Olin, Bradley and Scaife Foundations have provided over $5 million in grants to the Federalist Society. [39] Since 1993, the Federalist Society's funding has soared 182 percent. [40]

Undeniably Ideological

While the Federalist Society does not file legal briefs in court cases or draft an official platform, its views on major legal and constitutional issues are clearly far to the right on the political spectrum. In a recent column in *The Washington Post*, Federalist Society member Eugene Volokh declared the organization devoid of ideology: "We have no articles of faith." [41] Yet, at a later point in the same column, Volokh's own words betray this contention: "We think that a fair debate between us and our liberal adversaries *will win more converts for our positions* than for the other side's [emphasis added]." [42]

Resources on the Federalist Society's own Web site also discredit Volokh's notion that the organization has no real ideology. For example, the Web site promotes what it calls the "Conservative and Libertarian Pre-Law Reading List: An Introduction to American Law for Undergraduates and Others." According to this Society publication, the most important principles underlying the nation's legal system "are *private property ownership, freedom of contract, and limited government* [emphasis in original]," rhetoric reminiscent of the Lochner era when highly conservative judges tried to hold back the New Deal. [43] No wonder, then, that a March 2001 conference that the Society sponsored in Chicago carried the blunt headline "Rolling Back the New Deal." [44]

The Society's pre-law reading list is based on a lengthy article first published by the ultra-conservative Heritage Foundation. [45] Overall, the reading list is dominated by right-wing perspectives on the Constitution and jurisprudence. For example, under the category of public policy and

"public choice," the Federalist Society endorses an "economic analysis in addressing public policy issues" and specifically praises *Capitalism and Freedom*, a book by arch-conservative economist Milton Friedman, as the "classic treatment" in assessing public policy through this economic lens. [46]

The Society's constitutional law reading list is similarly revealing and is introduced with this glib pronouncement: "There are two kinds of constitutional lawyers: those who take the text of the Constitution seriously, and those who don't. Much of what is wrong with the American polity today is traceable, directly or indirectly, to the latter, who greatly outnumber the former." [47] Four names account for more than half of the individually authored recommended books and articles on this reading list: Bork, Scalia, Richard A. Epstein and Lino Graglia. What are their views on constitutional freedoms and civil rights?

Robert Bork's ultra-conservative credentials are well known. In 1963, he wrote a *New Republic* article opposing passage of the 1964 Civil Rights Act in which he took the position that outlawing racial discrimination in public accommodations would infringe business owners' rights. [48] Ten years later, under critical Senate questioning as a nominee for Solicitor General, he recanted that position. [49] In his 1996 book *Slouching Towards Gomorrah*, Bork put forth another breathtakingly radical constitutional theory by arguing that it should require only a simple majority for Congress to overturn Supreme Court rulings interpreting constitutional rights -- a theory with devastating potential to thwart the Court's power to defend individual liberties. [50] Just last December, after that theory was criticized by a *New York Times* columnist, Bork claimed that he had abandoned this idea, too -- not because he had thought better of the proposal itself, but because a similar measure instituted in Canada had not been effective. [51]

Bork, whose extreme views on the Constitution doomed his 1987 nomination for the Supreme Court, argued in *Slouching Towards Gomorrah* that censorship is needed "to root out the worst in our popular culture." [52] In *The Tempting of America: The Political Seduction of the Law* -- the 1990 book recommended on the Society's pre-law reading list -- Bork seemed several times to defend, then later abandon, his "strict constructionist" approach to the Constitution. He insisted, for example, that the Fourth Amendment only protects "papers," not "words." Yet, Bork also argued that it was entirely appropriate to derive a right against electronic eavesdropping. As Pulitzer prize-winning historian Leonard Levy summed up, Bork's message is that "the Constitution means what it says when it says what he means." [53]

Like Bork's, Scalia's philosophy is well honed and extremely conservative. Just this year, in *Zadvydas v. Davis*, Scalia was one of only two Supreme Court justices who argued that a Lithuanian man, a nondeportable illegal alien, could be held indefinitely in detention by the government. [54] In another case in the Court's just completed term, Scalia was one of only two dissenters in a ruling that struck down a death sentence reached by a

South Carolina jury that had not been given complete information about sentencing alternatives. While Scalia noted that a fully informed jury "may well be a good idea," he wrote that there was no constitutional requirement for it. [55]

Scalia's 1997 book, *Matter of Interpretation*, is recommended by the Society on its pre-law reading list. In a review in *The Nation*, Garrett Epps wrote that "Scalia's ideal civil law judge is something like a certain kind of Islamic jurist, to whom `interpretation' of the Koran is blasphemy" and that Scalia "finds no democratic value in guarantees against oppression of electoral minorities" and "believes elected bodies should be able to do whatever they want without a lot of whining from the losers." [56]

Epstein, a University of Chicago law professor, wrote the 1992 book *Forbidden Grounds: The Case Against Employment Discrimination Laws*, in which he assailed federal laws protecting civil rights in the workplace. [57] In "The Mistakes of 1937" -- the article included on the Society's pre-law reading list -- Epstein assailed two 1937 Supreme Court rulings. A key ruling that recognized the federal government's authority under the commerce clause, Epstein wrote, "throws the history and text of the Constitution into disarray." [58] Another ruling that enabled the federal government to regulate labor markets was unjustified, he wrote, even if the purpose was to protect the public health and safety. "If someone wants to take risks with health and safety in order to obtain a higher wage, then so much the better," Epstein wrote. "The classical theory of contract gives no reason to prohibit that transaction." [59]

In one of his most controversial books, *Takings: Private Property and the Power of Eminent Domain*, Epstein espoused views sharply at odds with long-settled constitutional law. While courts have historically interpreted the Fifth Amendment to require governments to compensate property owners for land taken through eminent domain, Epstein argued that zoning regulations, pollution control laws and even welfare payments amounted to "takings" of property by the government. Epstein admitted that his constitutional interpretation of property rights would effectively invalidate most laws passed in the 20th century. [60] In a 1995 book, Epstein devised a framework for defining privacy rights that significantly restricts such rights, disallowing even the rights of patients to maintain privacy of their medical records. [61]

No author has more contributions to the constitutional law section of the Society's pre-law reading list than Graglia, a University of Texas law professor who has vehemently opposed affirmative action and court-ordered school desegregation efforts in Texas. [62] The very titles of some of the Graglia articles that are recommended by the Society are revealing: "From Federal Union to National Monolith: Mileposts in the Demise of American Federalism" and "`Constitutional Theory': The Attempted Justification for the Supreme Court's Liberal Political Program." [63]

In the latter article, Graglia dismissed the significance of the Seventh Amendment to the Constitution -- adopted more than 200 years ago as

part of the original Bill of Rights to guarantee the right to a jury in a civil trial -- calling it "an unnecessary inconvenience." In this same article, Graglia contended that the equal protection clause of the Constitution does not prevent states from discriminating on the basis of such factors as sex or nationality. [64] In the former article, Graglia espoused even more shocking views, criticizing adoption of the Seventeenth Amendment -- which permitted Americans, instead of state legislatures, to directly elect U.S. senators -- because it weakened "state autonomy." [65]

Also in his article on federalism, Graglia voiced chagrin that the Lincoln administration did not permit southern states to leave the union. By refusing to accept secession and, instead, choosing to engage in a Civil War, Graglia wrote, the North deprived the South of "the right of freedom of *dis*association. Although the southern states had voluntarily joined the Union, the North had grown so attached to southerners as to prefer killing them to permitting them to depart. . . . The loss of the right to secede cost the states their ultimate defense against national encroachment upon any element of independence [emphasis in original]." [66] Incredibly, these Graglia articles are endorsed by the Society for those who want to learn "about the historical process that deformed many areas of constitutional law..." [67]

Graglia's extreme and outspoken views have made him a lightning rod. In 1997, he declared that Mexican-American and African American students were not academically competitive with white students due largely to "cultural effects." Of these minority groups, Graglia said, "They have a culture that seems not to encourage achievement. Failure is not looked upon with disgrace." Graglia has also been criticized for using the ugly, racially derogatory word "pickaninny" to refer to African American students in his classes. [68] Graglia's remarks drew widespread criticism. A resolution denouncing the statements was drafted in the Georgia House of Representatives, and a University of Texas regent called Graglia's comments a "cruel and insensitive lie." [69]

The Society's "Journalist's Guide to Legal Experts" -- a Web site inventory of attorneys and scholars to whom the organization steers the news media -- offers additional evidence of the group's overriding right-wing philosophy. While the Society's Web site points out that the views of these experts are their own, it also makes quite clear that the Society promotes them as espousing conservative and libertarian philosophies. Although conservatives and libertarians across the country hold differing views on many of the subjects listed, the views of those recommended by the Society on a number of specific controversial issues are strikingly uniform.

For example, all three people listed by the Federalist Society as gay rights law experts hold views that are hostile to gay rights. Michael Carvin, a Washington, D.C., attorney, actually represented Equal Rights, Not Special Rights, the political group that worked to overturn Cincinnati's human rights ordinance protecting gays from discrimination. [70] Carvin praised a court ruling that upheld Issue 3, an anti-gay amendment to Cincinnati's

city charter. "[The amendment] frees up local communities to pass initiatives like [Cincinnati's]," he said. [71]

Another of the experts, Notre Dame law professor Charles E. Rice, has strongly anti-gay views and has even attacked his university's administration for failing to emphasize the message that "[h]omosexual acts are intrinsically wrong." [72] The third expert offered to journalists is David M. Wagner, a law professor at Regent University, which was founded by right-wing televangelist Pat Robertson. In June 1999, Wagner signed onto a letter by 157 law professors that criticized an upcoming legal conference for discussing "the legal recognition of same-sex partnerships." The letter signed by Wagner argued that laws "to include same-sex unions" would create "unprecedented moral, social and legal confusion..." [73]

Similarly, on the issue of assault weapons, the Federalist Society recommends two experts for the media to contact: Nelson Lund of George Mason University law school and Eugene Volokh of UCLA Law School. [74] Both clearly have similar anti-gun control views, as evidenced by the fact that the National Rifle Association -- the best known extreme pro-gun group in America -- also recommends Lund and Volokh as experts for media interviews. In fact, an NRA press statement last year urged the media to interview Lund and Volokh, noting that both of them could be reached through NRA's own public affairs office. [75] Moreover, Volokh co-wrote a 1999 article entitled "Loaded Guns Can Be Good for Kids," in which he and co-author Dave Kopel strongly criticized a federal proposal to require guns to be sold with safety locks. [76]

From Network to Policy

In the face of clear evidence of the Federalist Society's pervasive ideological bent, Volokh and other spokespersons expect us to believe that the organization has no desire to convert its ideology into legislative, judicial or political action. Volokh has claimed that the Society's charter "is to create discussion, not to lobby," and Assistant U.S. Attorney General and Society member Viet Dinh has described the organization merely as "a forum for discussion of law and public policy from both sides." [77] Although the Federalist Society does sponsor debates and does not lobby or file briefs in the mold of a traditional advocacy organization, it is evident that the Society does aggressively promote its ideological point of view.

Instead of advocating change piecemeal -- one lawsuit or one bill at a time -- the Society seeks to produce much broader change by altering the entire legal landscape. This includes developing and promoting far-right positions, guiding law students and young lawyers accordingly, and influencing who will become judges, top government officials, and

decision-makers. It urges law students to join its law school chapters by noting that the Society "creates an informal network of people with shared views which can provide assistance in job placement." [78] To sum up the importance of the Society's outreach to law school students, the right-wing magazine *Insight* quoted former Supreme Court Justice Felix Frankfurter's observation: "In the last analysis, the law is what the lawyers are." [79] And once they become lawyers, the Society's lawyers' division seeks to build a network of attorneys to "exercise leadership in shaping national, state, and local policy." [80]

The Federalist Society's overall methods were best captured by its own executive director, Eugene Meyer, in a 1996 guest editorial in a Heritage Foundation publication. Meyer wrote that his organization "has built a network designed to overcome legal abuses and to return America to a legal system which operates according to the design of the founders." [81] Through this network of right-wing lawyers, government officials, scholars and judges, the Society seeks to fundamentally remake the American legal system.

Curtis Moore, a former Republican counsel to the U.S. Senate Committee on Environment and Public Works, recently offered a case study of how the Society's "network" operates and how far it extends. He noted the relentless attacks leveled by ultra-conservatives in Congress on the Clean Air Act. Moore noted that in May 1998 Senator Orrin Hatch filed a 29-page brief with the U.S. Court of Appeals for the D.C. Circuit, attacking the EPA's particulate standard. The brief, Moore explained, "was written by one member of the Federalist Society board, C. Boyden Gray, to be filed on behalf of another member of the Federalist Society board, Orrin Hatch, to defend the corporate interests of a member of the Business Advisory Council of the Federalist Society, Joseph Cannon of Geneva Steel, in a case to be heard by two judges, [Douglas] Ginsburg and [Stephen] Williams, who are active participants in Federalist Society events. . ." In addition, Gray had lobbied on behalf of Geneva Steel from January 1996 to July 1997. [82]

With the increased public scrutiny that the Society has recently received, Meyer and other leaders have downplayed its objectives. In April, for example, Meyer insisted that the group is simply interested in "discussion and in getting ideas heard." [83] Yet even activists on the far right don't seem to accept this explanation. Said ultra-conservative activist Grover Norquist: "If Hillary Clinton had wanted to put some meat on her charge of a `vast right-wing conspiracy,' she should have had a list of Federalist Society members and she could have spun a more convincing story." [84]

"Federalist" Principles vs. Federalist Authority

Activities by the Federalist Society and some of its prominent members on such subjects as congressional authority and civil rights reveal the scope of the changes the group seeks to bring about in America's legal landscape. As its name suggests, the organization warmly embraces its version of the concept of "federalism" -- limiting federal authority to areas such as national defense and ceding most powers to states and localities. While many Americans respect the right of state and local governments to make certain decisions, leading members of the Society take federalism to an extreme by seeking to block the ability of the federal government to enact and enforce laws protecting the environment, civil rights, workplace health and safety, and other areas.

The drumbeat for its radical view of federalism permeates the Federalist Society's publications and conferences -- including its law school chapters. An article in the newsletter of one such chapter laments that judges "have usurped state and local governmental authority..." [85] In an October 1997 Society panel entitled "Federalism Revived?" panelists critiqued Supreme Court rulings and articulated their view that courts should restrict the ability of the federal government to enforce various laws. Greg Katsas, a prominent Society member who serves as an officer of the organization's litigation practice group, criticized the Supreme Court's "bad" decision in *City of Rome v. United States* (1980) to uphold the federal government's authority to enforce the Voting Rights Act because, he said, it permitted "enormous intrusions into state voting structures..." [86]

Another panelist voiced support for the high court's ruling that struck down federal authority under the Brady Act to require state law enforcement officers to conduct background checks on prospective gun buyers. The panelist even complained that the decision written by Justice Scalia -- who helped establish the Society and nurture its growth -- was "unnecessarily apologetic" and could have been more emphatic in declaring that Congress overreached by passing the Brady Act. [87]

In addition to sponsoring a conference this year called "Rolling Back the New Deal," the Society itself has endorsed the view that Supreme Court decisions upholding congressional authority to enact New Deal legislation were harmful. In its online "Introduction to American Law" and reading list, the Society recommends several articles that make this point. [88] According to the Society, one article "describes the damage done to the Constitution's protection of economic liberties by the Court's approval of New Deal regulatory statutes." [89]

Prominent Federalist Society members have been at the leading edge of efforts to utilize such legal theories to limit civil rights and other protections. As a defense attorney in a Virginia rape case, Michael Rosman -- a leading figure in the Society -- used this right-wing view of states' rights to argue before the Supreme Court against the constitutionality of the 1994 Violence Against Women Act. [90] Rosman's case was bolstered by a friend of the court brief filed by prominent Federalist Society member Jeffrey Sutton, an officer in the Society's separation of powers and federalism practice group. The result was a

narrow 5-4 decision by the Court striking down key provisions of the Act. Sutton had earlier argued another Supreme Court case that struck down a congressional law designed to protect religious liberty, and praised the ruling in a Federalist Society article because it "strikes a welcome blow for States' rights." [91]

President Bush recently nominated Sutton for a seat on the U.S. Court of Appeals for the Sixth Circuit, and Sutton's role in harming civil rights and other protections through his narrow view of federalism has received significant criticism. Most recently, Sutton argued the *University of Alabama v. Garrett* case in the Supreme Court, producing a 5-4 decision that state employees who suffered discrimination could not sue under the federal Americans with Disabilities Act (ADA) to seek damages from the state. [92] The ADA has enjoyed the support of many prominent Republicans -- including former Senator Robert Dole and former President Bush, who signed the ADA into law. [93] Yet, Sutton reportedly claimed that the law is unnecessary and argued for an even broader Court ruling against the ADA. When asked by the Court during the Garrett hearing whether his argument was meant to challenge only limited portions of the ADA, Sutton replied, "Well, Your Honor, it's a challenge to the ADA across the board [emphasis added]." [94]

"Federalist" Principles vs. Equal Opportunity & Constitutional Rights

Many of those who hold key leadership positions in the Federalist Society have campaigned to dramatically undermine civil and constitutional rights protections. Many of these leaders help oversee the Society's practice groups on civil rights and constitutional liberties.

Charles J. Cooper, who chairs the organization's practice group on civil rights, is a well-known opponent of traditional anti-discrimination efforts. In fact, Cooper co-wrote an opinion while serving in the Reagan Justice Department that federal law did not prevent employers from refusing to hire people with AIDS if those employers cited a "fear of contagion, whether reasonable or not." [95] An article on the Society's Web site by Princeton University professor and leading Federalist Society member Robert George and attorney Bill Saunders attacks the U.S. Supreme Court's 1996 Romer v. Evans decision on anti-gay discrimination for curbing the ability of a state "to employ its 'police power' to protect public morals" George and Saunders write that if the repeal of state sodomy laws encourages the Supreme Court "to raise homosexuality to protected status, perhaps such conduct should not be de-criminalized in the first place." [96]

The chairman-elect of the civil rights practice group, Michael Carvin (see Undeniably Ideological), is no more friendly than Cooper to the civil rights of gay Americans. Carvin formerly worked for Cooper when he was

in the Justice Department's Civil Rights Division. In addition, he is a founder of the Center for Individual Rights, a far-right legal organization that, according to its Web site, files lawsuits pertaining to civil rights, congressional authority, elections, equal protection, the First Amendment, free exercise of religion, and freedom of speech. CIR represented applicants to the University of Texas Law School and got the Fifth Circuit Court of Appeals to rule that the school's desire to achieve diversity is not a sufficiently compelling state interest to support affirmative action in admissions. [97] Two of the co-counsel in this case were Theodore Olson (now solicitor general) and Douglas Cox, both Federalist Society members. [98] Carvin himself served as co-counsel in a Supreme Court case in which the Court severely limited the Justice Department's ability to take action against state and local governments that set up election districts on a discriminatory basis. [99]

Gail Heriot, a University of San Diego law professor who co-chairs the Society's civil rights practice group, also co-chaired the campaign to pass Proposition 209 -- a far-reaching California anti-affirmative action initiative so restrictive that the state Supreme Court interpreted it to outlaw outreach efforts for recruiting women and minorities. [100] Roger Clegg, a vice chairman of the civil rights practice group, is general counsel of the Center for Equal Opportunity, which vigorously opposes affirmative action and bilingual education and focuses, as well, on immigration and redistricting. [101]

Society leaders on religious liberty and other issues also hold troubling views. Gerard V. Bradley, who is the chairman-elect of the Society's practice group on religious liberties, wrote an article criticizing Unitarians for "indifferentism," adding: "They [Unitarians] don't think you have to believe anything at all." [102] In 1997, Bradley joined Religious Right leaders Gary Bauer, Ralph Reed, D. James Kennedy and other clergy in signing a manifesto on religion that complained that parents who wish to choose a "religious education" for their children "are unjustly burdened." [103]

Nicole Garnett -- who chairs the Society's school choice subcommittee -- is a former staff attorney for the Institute for Justice, [104] which provides legal assistance to support private-school voucher programs. In a 1998 article, Garnett assailed the "audacity" and "belittling attitude" of the NAACP in going to court to challenge the constitutionality of the Milwaukee voucher program. [105]

Reproductive choice, of course, is another target of the Society's leaders. The George-Saunders article cited previously assails "the abortion license manufactured by the [Supreme] Court in *Roe v. Wade*." [106] James Bopp, Jr., who is general counsel for the anti-abortion National Right to Life Committee, is a prominent Society member and chairs one of the Society's subcommittees. [107]

Case Study: Ending ABA Review of Judicial Nominees

The writings, speeches or activities of Federalist Society members often set the stage for broader action by those on the right. As an illustration, consider President George W. Bush's recent announcement ending the role of the nonpartisan American Bar Association in reviewing the qualifications of potential judicial nominees for the federal courts prior to their nomination. Actions taken several years ago by Society members helped to encourage President Bush's decision to terminate the ABA's nearly half-century-old service. Since the Eisenhower administration, the ABA has provided an important service to presidents of both parties and the nation by vetting the qualifications of those under consideration for lifetime appointment to the federal judiciary.

The Society's campaign against the ABA appears to be payback for a perceived wrong against one of the Society's leading lights. Although Supreme Court nominee Robert Bork received an overall rating of "well-qualified" (the highest possible rating) in 1987 from the ABA, Society members were angered that one of their own had received "not qualified" ratings from four of the 15 members of the ABA panel. [108] Many Society members felt these negative ratings helped bring about Bork's rejection by the Senate, and this influenced the organization to begin an in-depth investigation of ABA's activities in 1992. Four years later, in August 1996, the Society formally launched its "ABA Project," which was designed to assess the ABA's activities. A former law clerk of Judge Bork's was one of the leaders in these Federalist Society initiatives. [109]

On February 24, 1997, then-Senate Judiciary Committee Chairman Orrin Hatch -- a Federalist Society member whose son, Brent, is now the Society's treasurer [110] -- announced in a letter that he would "no longer consider the ABA as enjoying an official Senate role in the confirmation process" for federal judges. (The ABA continued to work with the White House in its pre-nomination review of nominees until the 2001 action by President Bush, however.) [111] Several days before sending his letter, Hatch gave a speech to one of the Society's law school chapters. A copy of the text of Hatch's speech, which attacked the ABA's "political" nature, specifically cited the Society's *ABA Watch* publication as a source. [112] Moreover, one of the key people to testify at 1996 Senate hearings that questioned the ABA's role was Edwin Meese, the Society leader who served as President Reagan's attorney general. [113]

Long after Hatch's 1997 announcement, the Federalist Society stayed on the attack, constantly raising concerns about the ABA -- frequently voicing allegations ("Critics have charged that the ABA's recent. . .") as if the Society were simply a neutral observer. [114] In January 2000, the Society began its ABA "voter guide" project, reporting on the issue positions of candidates for ABA's top offices. [115] The unceasing attacks and pressure that Society and other right-wing groups used to sully the ABA's image

were instrumental in encouraging and providing "cover" for President Bush's decision to end the ABA's pre-nomination review. In fact, the recommendation to eliminate the ABA role came directly from the White House counsel's office, which is heavily staffed by Federalist Society members.

Seizing the Day: The Federalist Society and the Federal Courts

Recently, the media have begun to look more closely at the Federalist Society's influence in the selection of judicial nominees by the Bush administration. The Society's behind-the-scenes role is not new. Society members influenced judicial nomination decisions in the Reagan and the elder Bush's administrations. [116] Roger J. Miner, a senior federal appeals court judge appointed to the bench by Ronald Reagan, observed this role: "Lee Liberman [Otis], a founder of the new Federalists and now Assistant Counsel to the President, examines all candidates for federal judgeships for ideological purity. It is well known that no federal judicial appointment is made without her imprimatur." [117] Otis -- who co-founded the Society's University of Chicago chapter in 1982 -- screened judicial candidates and worked closely with Society leader C. Boyden Gray, White House counsel under President George H.W. Bush. [118] As a former Supreme Court law clerk has observed, membership in the Society "became a prerequisite" for law students seeking clerkships with many Reagan judicial appointees, as well as for top positions in the Justice Department and the White House. [119]

During the Reagan years, the Society was just beginning to hit its stride. Today, the organization has a sophisticated network that gives it major influence in shaping important policy decisions and filling top positions in government and on the courts. Federalist Society members today hold key positions in the Justice Department and the White House with direct responsibility for selecting federal judicial nominees. These include Attorney General John Ashcroft, Assistant Attorney General Viet Dinh, Deputy White House Counsel Tim Flanigan, and Associate White House Counsel Brett Kavanaugh.

Society members both within and outside of the Bush administration recognize the unique opportunity that now exists to shape the federal courts. [120] In fact, an article on the Society's Web site attacking *Roe v. Wade* and other specific rulings asks: "What are we to do about such judges? Impeachment is sometimes mentioned, but remains impractical. It appears that *our best hope continues to be . . . working to ensure the appointment of justices and judges who respect the constitutional limits of their own authority* [emphasis added]." [121]

There are now more than 100 vacancies on the federal courts, many on the U.S. Courts of Appeals and many the direct result of a Republican

Senate's refusal to vote -- or even to conduct hearings -- on President Clinton's nominees. Indeed, right-wing Senators Trent Lott, Jon Kyl, Jeff Sessions, Hatch, and Ashcroft blocked many Clinton nominees. Only one of Clinton's judicial nominees was defeated in an up-and-down vote on the Senate floor. Instead, Senate Republicans effectively ended these nominations by preventing any vote. According to data from the Congressional Research Service, from 1995 through the year 2000, the Republican -- controlled Senate refused to act on an astonishing 37 percent of President Clinton's nominees to the U.S. Courts of Appeals. [122]

In addition to the large number of vacancies in the U.S. Courts of Appeals, we are now in the longest interval between Supreme Court vacancies in 178 years. For this reason, most court-watchers expect President Bush will have an opportunity to appoint one or more Supreme Court justices over the remaining years of his administration. Filling just the current and projected vacancies on the federal courts over the next four years with right-wing judges in the mold of Clarence Thomas and Antonin Scalia would fundamentally alter the entire federal judiciary and endanger bedrock constitutional and civil rights throughout the country for decades to come.

As People For the American Way Foundation extensively documented in its 2000 report, *Courting Disaster*, a Supreme Court majority that shared the views of Justices Scalia and Thomas -- and the Federalist Society -- would put at grave risk many of the most fundamental rights and liberties that Americans have come to take for granted. A Scalia-Thomas Court could overturn more than 100 key precedents protecting a wide range of civil and constitutional rights. Given that one out of three decisions in the most recent term of the Supreme Court were decided by 5-4 votes, future nominees will play a pivotal role. [123] In short, a Scalia-Thomas majority could overturn, in whole or in part, Supreme Court precedents on the right to privacy, reproductive freedom, civil rights, religious liberties, environmental protection, worker and consumer rights, and many other fundamental rights.

James Piereson, executive director of the right-wing John M. Olin Foundation, recently assessed the progress of groups such as the Federalist Society. "While Reagan was conservative," Piereson said, "he didn't have this network to turn to when he was filling jobs. It is satisfying to see all these Federalist Society members in the White House." [124] And those Society members have been hard at work, laying the groundwork for appointments that could dramatically reshape the federal judiciary.

Opening Round: The Courts of Appeals

By mid-March, a screening committee headed by President Bush's White House counsel, Alberto Gonzales, had interviewed more than 50 judicial

candidates. According to press reports, the young lawyers who serve on this committee "typically have collected similar credentials for entry in that elite group; most have been law clerks for conservative judges and Supreme Court justices and are members of the Federalist Society..." [125] Michael J. Gerhardt, a William and Mary Law School professor and recognized authority on the judicial selection process, assessed the key factors that appear to be driving the Bush administration's judicial nominations process. Describing the standards being used to evaluate potential nominees, Gerhardt expressed the view that the committee is looking for indicators "like the kinds of causes people have been involved with. They have to have some record of supporting the ideology and membership in the Federalist Society is one very strong indicator," said Gerhardt. [126]

Indeed, six of Bush's first 11 nominees to the influential federal courts of appeals have been Society members. Since the Supreme Court actually hears only a very small number of the cases that are appealed to it, the U.S. Courts of Appeals are frequently the last stop for critical cases on constitutional rights. [127] In addition, the federal appeals courts serve as a kind of apprenticeship for future Supreme Court nominees. Seven of the current nine Supreme Court justices were serving on the U.S. Courts of Appeals when they were nominated to the high court. Given the significance of the federal appeals courts, the Bush administration's nominees deserve close examination. Several of these nominees who are Federalist Society members are among the most right-wing people tapped by Bush to serve in any capacity. For example:

- **Jeffrey Sutton**, an officer in the Society's Separation of Powers and Federalism practice group, has been nominated to the U.S. Court of Appeals for the Sixth Circuit. Sutton is well known for his efforts to curtail congressional authority and limit federal protections against discrimination and injury based on disability, race, age, sex, and religion, as discussed earlier. As of July 3, more than 50 national and international organizations and over 220 regional, state, and local groups have opposed Sutton's confirmation, including the American Association of Persons with Disabilities, the National Rehabilitation Association, the National Women's Political Caucus, and the Welfare Law Center. [128] As the *Wall Street Journal* recently reported, Sutton was described even by one of his supporters as the "perfect kind of poster child for what Democrats see as prototypical George W. Bush judges." [129]

- **Michael McConnell**, a Society member nominated to the U.S. Court of Appeals for the Tenth Circuit, has drawn significant criticism, particularly for his views on reproductive choice and privacy and on church-state separation. For example, McConnell has called the Supreme Court's decision in *Roe v. Wade* "illegitimate" and "an embarrassment." McConnell signed a 1996 "Statement of Pro-Life Principle and Concern" that claimed that abortion "kills 1.5 million innocent human beings in America every year" and called for a constitutional amendment to ban abortion. [130] McConnell has also called for a "radical" departure from decades of church-state separation rulings by the Supreme Court, such as decisions prohibiting government-sponsored prayer at public school graduations and limiting government endorsement of religious displays on public property. [131]

- **Priscilla Owen**, a Society member and currently a justice on the Texas Supreme Court, has been nominated to the U.S. Court of Appeals for the Fifth Circuit. Owen has been criticized as one of two justices on "the far right wing" of the Texas court, further to the right than Bush's own appointees to that court when he was governor. [132] In a Texas Supreme Court decision in which she dissented, Owen called for a very narrow view of a state law concerning the ability of minors to obtain an abortion without parental consent. Then-Texas Supreme Court Justice Alberto Gonzalez -- who is now chief White House counsel --

warned that adopting the dissenters' view "would be an unconscionable act of judicial activism." [133]

- **Carolyn Kuhl**, a Federalist Society member and currently a state superior court judge, was recently nominated to the United States Court of Appeals for the Ninth Circuit. She has been severely criticized for her record on privacy and reproductive rights and on civil rights. For example, while in the Justice Department under the Reagan Administration, Kuhl urged the Supreme Court to overturn the *Roe v. Wade* decision as "flawed." She also reportedly played a key role in convincing then-Attorney General William French Smith to reverse prior policy and support a policy that would have granted tax-exempt status to Bob Jones University despite its racially discriminatory practices. [134] A Supreme Court decision later rejected the Reagan administration's approach by an 8-1 vote. [135]

To get a sense of the tremendous shift that America could expect if the Federalist Society succeeds in controlling nominations for the federal courts, consider the state of Michigan, where Governor John Engler and five of the seven justices on the state Supreme Court are Society members. [136] According to a survey of cases before that court in which private citizens faced off against insurance companies and corporations, the Michigan Supreme Court ruled against the citizen plaintiffs in 19 out of 20 cases. During the previous year, when moderate justices who were not Society members held a majority on the state Supreme Court, individual plaintiffs won roughly half of the time -- prevailing in 22 of 45 cases. [137]

Plotting an Extreme Course

The extreme nature of the positions that have been advocated by the Federalist Society and its leaders and detailed in this paper puts the Federalist Society far from the mainstream of beliefs shared by most Americans and enshrined in decades of constitutional jurisprudence and national policy. The leading voices of the Society share an ideology that is hostile to civil rights, reproductive rights, religious liberties, environmental protection, privacy rights, and health and safety standards, and would strip our federal government of the power to enforce these rights and protections. While individual members of the Society may hold different views, the driving force of the Society -- its leadership -- is united behind this extreme ideology. Even the words that define the purpose of government and the courts for ordinary people, fundamental values such as "fairness" and "tolerance," have been called into dispute. Richard Posner, a Seventh Circuit Court of Appeals judge with close ties to the Federalist Society, has derided these words as "terms which have no content." [138]

Instead of lobbying or advocating in a very public and traditional manner, the Society is now working from powerful positions within the White House, the Justice Department and throughout the Bush administration. The Society's ambitions are not only to drive the nation's legal policies far to the right, but to lock in these changes for decades to

come by controlling appointments to the federal court system. C. Boyden Gray, a Society member who served as White House counsel under Bush's father, has encouraged the younger Bush to use nominations for lifetime appointments to the federal courts to help create a legacy for his administration. "A president can put his or her stamp on the judiciary for a lot longer than he or she can the executive branch," said Gray. [139] Indeed, he can -- and if the Federalist Society has its way, President Bush will.

It's true that Federalist Society members, like all other Americans, have the constitutionally protected right to hold and express their own views and to join together with like-minded people in pursuit of shared goals. But it's also true that ideas have consequences. And the consequences of the ideas that leaders of the Federalist Society are promoting for the courts and the nation would be disastrous for Americans' fundamental rights.

Appendix A:
Federalist Society Members in the Bush Administration

Membership in the Federalist Society has long served as a network for ultraconservative legal professionals to discuss political and legal strategy aimed at creating an "intellectual network that extends to all levels of the legal community." [140] While membership in the Federalist Society is probably a prerequisite for any law student who hopes to clerk for Supreme Court Justices Antonin Scalia or Clarence Thomas, it is increasingly becoming a pathway to a position within President George W. Bush's administration. The individuals listed below -- who are members of or have strong affiliations with the Federalist Society -- occupy, or have been nominated to, prominent positions in the Bush administration. [141]

Department of Justice

- John Ashcroft, Attorney General
- Larry Thompson, Deputy Attorney General
- Ted Olson, Solicitor General
- Viet Dinh, Assistant Attorney General for Legal Policy
- Thomas L. Sansonetti, Assistant Attorney General for Environment and Natural Resources
- Paul Clement, Principal Deputy Solicitor General
- R. Ted Cruz, Associate Deputy Attorney General
- Sarah V. Hart, Director, National Institute of Justice

Office of White House Counsel

- Timothy Flanigan, Deputy Counsel
- Brett Kavanaugh, Associate Counsel
- Bradford Berenson, Associate Counsel
- Noel Francisco, Assistant Counsel

Department of Energy

- Spencer Abraham, Secretary
- Lee Liberman Otis, General Counsel and a co-founder of one of the Society's oldest law school chapters

Department of the Interior

- Gale Norton, Secretary

Department of Agriculture

- James R. Moseley, Deputy Secretary
- William H. Lash III, Assistant Secretary for Market Access and Compliance

Department of Education

- Brian Jones, General Counsel
- Gerald Reynolds, Assistant Secretary for Civil Rights

Department of Labor

- Eugene Scalia, Solicitor of Labor Department of Defense

Department of Defense

- Joseph E. Schmitz, Inspector General

Department of Health and Human Services

- Alex Azar III, General Counsel

State Department

- John R. Bolton, Undersecretary for Arms Control and International Security Affairs

General Services Administration

- Daniel Levinson, Inspector General Federal

Federal Judicial Nominees

- Paul G. Cassell, nominated to the U.S. District Court for the District of Utah
- Edith Brown Clement, nominated to the U.S. Court of Appeals for the Fifth Circuit
- Deborah Cook, nominated to the U.S. Court of Appeals for the Sixth Circuit [142]
- Miguel Estrada, nominated to the U.S. Court of Appeals for the District of Columbia Circuit
- Harris L. Hartz, nominated to the U.S. Court of Appeals for the Tenth Circuit
- Carolyn B. Kuhl, nominated to the U.S. Court of Appeals for the Ninth Circuit
- Michael McConnell, nominated to the U.S. Court of Appeals for the Tenth Circuit
- Priscilla R. Owen, nominated to the U.S. Court of Appeals for the Fifth Circuit
- Jeffrey Sutton, nominated to the U.S. Court of Appeals for the Sixth Circuit
- Timothy M. Tymkovich, nominated to the U.S. Court of Appeals for the Tenth Circuit

Appendix B:
Other High Profile People Who Belong to or Are Affiliated with the Federalist Society

- James Bopp, General Counsel to the National Right to Life Committee, the James Madison Center for Free Speech, and former counsel to the Christian Coalition
- Judge Robert Bork, failed Supreme Court nominee
- Michael Carvin, former Assistant Deputy Attorney General in the Justice Department under President Reagan. Gail Heriot, co-chaired the campaign supporting California's Proposition 209
- Linda Chavez, President of the Center for Equal Opportunity, a right wing organization dedicated to fighting affirmative action programs
- Roger Clegg, Vice President and General Counsel for the Center for Equal Opportunity
- Charles Cooper, former Assistant Attorney General, Office of Legal Counsel under Ronald Reagan
- Maura Corrigan, Michigan Supreme Court Chief Justice
- Frank Easterbrook, Judge on the United States Court of Appeals for the Seventh Circuit
- John Engler, Governor, State of Michigan
- Richard Epstein, law professor at the University of Chicago Law School, author of *Forbidden Grounds: The Case Against Employment Discrimination Laws and Takings: Private Property and the Power of Eminent Domain*
- Thomas F. Gede, former Assistant Attorney General, State of California
- Lino Graglia, University of Texas law professor and ardent opponent of affirmative action
- C. Boyden Gray, former White House Counsel to George H.W. Bush during his terms as president and vice president. He is now the Chairman of Citizens for a Sound Economy
- Senator Orrin Hatch, ranking Republican on the Senate Judiciary Committee
- Don Hodel, former President of the Christian Coalition
- Lynn Hogue, Chairman of the Legal Advisory Board of the Southeastern Legal Foundation who led the charge to get former President Clinton disbarred
- Alan G. Lance, Attorney General, State of Idaho
- Stephen Markman, Michigan Supreme Court Justice
- Nancie Marzulla, President of Defenders of Property Rights
- Roger Marzulla, General Counsel and Chairman of the Board of Directors of Defenders of Property Rights
- Charles Murray, author of *The Bell Curve*, a 1994 book that asserted that some races are inherently less intelligent than others
- Robert Natelson, senior fellow at the Independence Institute
- Barbara Olson, author of *Hell To Pay: The Unfolding Story of Hillary Rodham Clinton*, and wife of Solicitor General Ted Olson
- David Owsiany, Chief of Policy and Research for the Ohio Department of Insurance
- Richard Posner, Judge on the U.S. Court of Appeals for the Seventh Circuit and a senior lecturer at the University of Chicago Law School
- William Pryor, Attorney General, State of Alabama
- Grover Rees III, special assistant for judicial selection under former Attorney General Edwin Meese.
- Antonin Scalia, Supreme Court Justice
- David Sentelle, protégé of Sen. Jesse Helms who was appointed to the Special Division, the three judge panel responsible for overseeing the investigations of the Independent Counsel by Chief Justice William Rehnquist.
- Bradley Smith, Member of the Federal Election Commission, Author of Unfree Speech: The Folly of Campaign Finance Reform, in which he argues that campaign finance regulations are unconstitutional
- Kenneth Starr, former Independent Counsel
- Don Stenberg, Attorney General, State of Nebraska
- Clifford Taylor, Michigan Supreme Court Justice
- Richard Thornburgh, former U.S. Attorney General and former Governor of the State of Pennsylvania
- David Wagner, former Director of Legal Policy for the Family Research Council
- Elizabeth Weaver, Michigan Supreme Court Justice
- Robert Young, Michigan Supreme Court Justice

End Notes

1. Dana Milbank, *Washington Post*, March 25, 2001; Milbank explains that Bush's "appointments have come as a surprise even to conservative leaders, who expected Bush, particularly after the disputed election, to follow a centrist path closer to his father's."

2. Quote by Edward J. Feulner, president of the Heritage Foundation, is taken from *The New York Times*, March 18, 2001.

3. Thomas B. Edsall, "Federalist Society Becomes a Force in Washington," *Washington Post*, April 18, 2001, p. A4.

4. ibid.

5. Dana Milbank, "White House Counsel Office Now Full of Clinton Legal Foes," *Washington Post*, January 30, 2001, p. A8.

6. David Wagner, "When Conservatives Lay Down the Law," *Insight*, August 10, 1998.

7. Jerry M. Landay, "The Conservative Cabal That's Transforming American Law," *Washington Monthly*, March 2000, accessed online July 10, 2001.

8. "The Federalist Society and the Challenge to a Democratic Jurisprudence," Institute for Democracy Studies, January 2001, pp. 5, 7-10, 29-32.

9. ibid, pp. 8, 14.

10. ibid, pp. 7-8.

11. The American Conservative Union's Ratings of Congress, "1995 Ratings - Descriptions of House Votes," accessed July 12, 2001. (NOTE: Through the year 2000, McIntosh had a lifetime rating of voting 97 percent of the time for ACU's position. McIntosh's percentage would likely have been even higher had it not been for votes he missed in the last session of Congress.)

12. Nina J. Easton, *Gang of Five: Leaders at the Center of the Conservative Crusade*, 2000 (Simon & Schuster: New York, NY), p.193; Allan Freedman, "Republicans Concede Missteps in Effort to Rewrite Rules," Congressional Quarterly, December 2, 1995, p. 3645.

13. The Federalist Society for Law and Public Policy Studies, Annual Report, Fiscal Year 1998, pp. 295-297.

14. See "Nomination of William Bradford Reynolds to be Associate Attorney General of the United States," Hearings Before the Senate Judiciary Committee (99th Cong., 1st Sess. (SHrg.99-3374) (June 4, 5, and 18, 1985).

15. *Id.* at 887, 971 (Statement by Senator Specter).

16. Nina J. Easton, *Gang of Five: Leaders at the Center of the Conservative Crusade*, 2000 (Simon & Schuster: New York, NY), p.193.

17. "Board of Visitors" The Federalist Society, accessed on June 7, 2001.

18. Gerald Walpin, "Emperor Miranda Has No Clothes But the Reno Justice Department Instructed Its Staff Not to Say So," accessed on June 7, 2001 from.

19. Gerald Walpin, "A Scholarly and Courageous Treatise on the Victory of Obscenity over Morality," accessed on June 6, 2001 from.

20. Lillian BeVier, "What Privacy Is Not," 12 Harv. J. Law & Policy 99, 1989.

21. ibid.

22. "Time to Decommission this Commission: Has the United States Commission on Civil Rights Outlived its Purpose?" panel sponsored by the Independent Women's Forum, February 29, 2000, transcript accessed June 17, 2001 from.

23. The remaining two members of the Federalist Society's board of visitors are Lois Haight Herrington, a Contra Costa County (Calif.) Superior Court judge and former Assistant Attorney General under President Reagan, and Andrew J. Redleaf, who is founder and CEO of Whitebox Advisors, a money management firm.

24. "The Federalist Society and the Challenge to a Democratic Jurisprudence," Institute for Democracy Studies, January 2001, pp. 29-32.

25. Text is taken from the Federalist Society's Lawyers Division Membership Application.

26. ibid, p.2.

27. Membership information accessed July 5, 2001. The Federalist Society for Law and Public Policy Studies, Annual Report, Fiscal Year 1998, pp. 18-19.

28. The Federalist Society for Law and Public Policy Studies, Annual Report, Fiscal Year 1998, pp. 10.

29. "Schedule of Grants" 1999, John M. Olin Foundation Inc. Web site.

30. Tamar Lewin, "3 Conservative Foundations Are in the Throes of Change," *The New York Times*, May 20, 2001.

31. Barbara Miner, "The Power And the Money: Bradley Foundation Bankrolls Conservative Agenda," *Rethinking Schools*, Spring 1994, Volume 8, Number 3, p. 17.

32. "Author Backs Off Anita Hill Attacks," *Associated Press*, Washington, D.C., June 27, 2001.

33. Barbara Miner, "The Power And the Money: Bradley Foundation Bankrolls Conservative Agenda," *Rethinking Schools*, Spring 1994, Volume 8, Number 3, p. 17.

34. Mike Allen, "Bush Aims to Get Faith Initiative Back on Track," *Washington Post*, June 25, 2001, p. A1.

35. Robert Parry, "D(OIL)E: What wouldn't Bob Do for Koch Oil?" *The Nation*, August 26, 1996.

36. "20 Years of Advancing Civil Society," Cato Institute Timeline, 1977-1997, accessed July 5, 2001.

37. "How the Scaremongers Drive Up Home Prices," Cato Online, accessed July 5, 2001; Doug Bandow, "Minimum Wage Redux," Cato: Today's Commentary, November 1, 1999, accessed July 5, 2001.

38. Cursor's Media Transparency, "Recipients by amount granted by the Charles G. Koch Charitable Foundation,".

39. ibid, pp. 5-6.

40. Aimee Howd, "Law Schools vs. Dissenting Views," *Insight*, November 29, 1999.

41. Eugene Volokh, "Our Flaw? We're Just Not Liberals," *Washington Post*, June 3, 2001, B3.

42. ibid.

43. Michael DeBow and Roger Clegg, The Conservative and Libertarian Pre-Law Reading List: An Introduction to American Law for Undergraduates and Others, February 10, 1999, accessed July 5, 2001.

44. "Rolling Back the New Deal: Judicial Review of Economic Regulations," a conference on March 28, 2001 sponsored by the Federalist Society's Chicago lawyers chapter and the Society's environmental law practice.

45. Michael DeBow and Roger Clegg, "The Conservative and Libertarian Pre-Law Reading List: An Introduction to American Law for Undergraduates and Others," accessed June 21, 2001.

46. ibid.

47. ibid.

48. Robert Bork, "Civil Rights -- A Challenge," *New Republic*, August 31, 1963; Bork also wrote a subsequent article that challenged the public accommodations and employment provisions of the then-proposed Civil Rights Act. This article was published in the *Chicago Tribune* (March 4, 1964).

49. Hearings before the U.S. Senate Judiciary Committee on the Nomination of Robert H. Bork to be U.S. Solicitor General, January 17, 1973.

50. Robert H. Bork, *Slouching Towards Gomorrah*,1996, HarperCollins, New York, N.Y., p. 117.

51. Robert H. Bork, *The New York Times*, Letters to the Editor, December 12, 2000.

52. "Robert H. Bork Critiques Libertarianism," excerpt from pages 150-152 of Bork's book *Slouching Towards Gomorrah*, 1996, HarperCollins Publishers; accessed July 9, 2001.

53. Leonard W. Levy, "The New Right Against the Old Rights," *Los Angeles Times*, November 12, 1989.

54. *Zadvyas v. Davis*, dissent of Justice Scalia, joined by Thomas, U.S. Supreme Court, No. 99-7791, decision released on June 28, 2001.

55. "High Court Overturns Death Sentence with Rebuke to State Court," *The New York Times*, March 20, 2001.

56. Garrett Epps, "A Matter of Interpretation: Federal Courts and the Law (Book Reviews)," *The Nation*, January 27, 1997.

57. Brief commentaries on the Epstein book were accessed July 9, 2001 via Harvard University Press

58. Richard A. Epstein, "The Mistakes of 1937," *George Mason University Law Review*, Volume 11, Number 2, 1988, p. 11.

59. ibid, p. 14.

60. Nina J. Easton, *Gang of Five: Leaders at the Center of the Conservative Crusade*, 2000, Simon & Schuster, New York, N.Y., p. 67.

61. Richard A. Epstein, "Deconstructing Privacy: And Putting It Back Together Again," University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 75, April 1999, accessed July 9, 2001.

62. Lino Graglia, "Is Affirmative Action on the Way Out? Should It Be?" A Symposium, *Commentary*, March 1998 issue, accessed July 9, 2001; Georgia House of Representatives, H.R. 1139, a resolution denouncing the racist statements of Professor Lino Graglia; and for other purposes, accessed June 1, 2001.

63. "Conservative and Libertarian Legal Scholarship: An Annotated Bibliography," The Federalist Society, accessed July 2, 2001.

64. Lino A. Graglia, "`Constitutional Theory': The Attempted Justification for the Supreme Court's Liberal Political Program," *Texas Law Review*, March Volume 65, 1987.

65. Lino A. Graglia, "From Federal Union to National Monolith: Mileposts in the Demise of American Federalism," *Harvard Journal of Law & Public Policy*, Volume 16, 1993, p. 131.

66. ibid, pp.132-33.

67. Michael DeBow and Roger Clegg, "The Conservative and Libertarian Pre-Law Reading List: An Introduction to American Law for Undergraduates and Others," accessed July 16, 2001.

68. "H.R. 1139, a resolution denouncing the racist statements of Professor Lino Graglia; and for other purposes," Georgia House of Representatives, accessed June 1, 2001.

69. ibid; "UT Professor Has Freedom of Speech, Should Use Tact," *The Daily University Star Online*, September 17, 1997, accessed July 9, 2001.

70. "Law Denying Gay Protection Stands," *The Cincinnati Enquirer*, October 14, 1998, accessed July 5, 2001.

71. Kristen Delguzzi, "Gay Rights in City Set Back," *Cincinnati Enquirer*, online edition, October 24, 1997, accessed July 16, 2001.

72. Charles Rice, "Inconsistent View of Homosexuality," *The Observer*, Notre Dame University, March 8, 2000, accessed July 6, 2001.

73. "To Reaffirm Marriage: A Statement on the Definition of Marriage From Law Professors Across the World," June 29, 1999, accessed July 9, 2001.

74. "Journalist's Guide to Legal Experts," The Federalist Society, accessed July 9,2001.

75. "NRA Gives Gun Control Group an `F' in History and Civics," U.S. Newswire, press statement, February 15, 2000.

76. Dave Kopel and Eugene Volokh, "Loaded Guns Can Be Good for Kids," Cato Institute: Today's Commentary, June 1, 1999, accessed July 12, 2001.

77. Eugene Volokh, "Our Flaw? We're Just Not Liberals," *Washington Post*, June 3, 2001, p.B3; "Exchange" *Washington Post*, June 3, 2001, p. B3.

78. "How to Form and Run a Federalist Society Student Chapter," accessed July 12, 2001.

79. Aimee Howd, "Law Schools vs. Dissenting Views," a 1999 article that was accessed on May 29, 2001.

80. Text is taken from the Federalist Society's Lawyers Division Membership Application.

81. Eugene B. Meyer, "A Tyranny of the Judiciary?" reprinted from November 1996 issue of *Insider*, a Heritage Foundation publication, accessed July 5, 2001.

82. Curtis Moore, "Lawsuit Against Clean Air Act by Members of Congress Raises Conflict-of-Interest Questions," guest commentary, Center for Public Integrity, August 29, 2000, accessed July 5, 2001.

83. Thomas B. Edsall, "Federalist Society Becomes a Force in Washington," *Washington Post*, April 18, 2001, p. A4.

84. ibid.

85. Robert Bodi, "Judicial Activism: A Threat to Democracy," Federalist Society chapter newsletter, University of Akron (OH) School of Law, September 2, 1999.

86. "Federalism Revived? The Printz and City of Boerne Decisions," a panel discussion sponsored by the Federalist Society's federalism and separation of powers practice group in Washington, D.C., October 17, 1997; transcript of the panel was accessed July 11, 2001.

87. Transcript of "Federalism Revived?," a panel sponsored by the Federalist Society, held in Washington, D.C., on October 17, 1997.

88. Michael DeBow and Roger Clegg, *The Conservative and Libertarian Pre-Law Reading List: An Introduction to American Law for Undergraduates and Others*, February 10, 1999, p.6, accessed July 5, 2001.

89. ibid.

90. Jerry M. Landay, "The Conservative Cabal That's Transforming American Law," *Washington Monthly*, March 2000, accessed online July 10, 2001.

91. Jeffrey Sutton, "City of Boerne v. Flores: A Victory for Federalism,".

92. *Board of Trustees of the University of Alabama v. Garrett*, No. 99-1240, U.S. Supreme Court decision issued on February 21, 2001.

93. Senator Robert Dole, whose suffered a wartime wound that limited his use of one arm, is a strong supporter of ADA. Dole not only voted for the Act, but he recently made a public appearance with professional golfer Casey Martin and filed a court brief in support of Martin's ADA lawsuit -- Martin won a 7-2 Supreme Court ruling in May 2001 that forces golf officials to allow him to use a motorized cart in tournaments since walking is very painful for Martin. Former President Bush, of course, signed ADA into law in 1990, and he voiced enthusiastic support for the measure -- even filing a court brief in *University of Alabama v. Garrett* in support of the two Alabama state employees who filed the original suit. In a July 26, 2001 official White House statement, President George W. Bush pointed to his father's support for ADA, noting that "my father saw the need for a comprehensive law to liberate the energies and talents of people with disabilities"

94. Quote from news release, ADA Watch, May 19, 2001.

95. "The Federalist Society and the Challenge to a Democratic Jurisprudence," Institute for Democracy Studies, January 2001, p. 13.

96. Robert George and William Saunders, "Romer v. Evans: The Supreme Court's Assault on Popular Sovereignty," May 29, 2001.

97. *Hopwood v. State of Texas*, 78F.3d 932 (5th Cir. 1996), cert denied,518 U.S. 1022 (1996).

98. "CIR's Greatest Courtroom Victories,".

99. *Reno v. Bossier Parish School District*, 528 U.S.320 (2000); "CIR's Greatest Courtroom Victories,".

100. Gail Heriot Bio in California Civil Rights Initiative; "Decision Is Deadly," U-Wire, December 7, 2000, accessed July 13, 2001.

101. The Center for Equal Opportunity's strong opposition to affirmative action was evidenced by information on its Web site, accessed July 12, 2001.

102. Gerard V. Bradley, "Divine Mirth," *Catholic Dossier*, May-June 1998, accessed on June 7, 2001.

103. Text of 1997 letter accessed from the Federal Society's Web site.

104. "NAACP's Parent Trap," *Center-Right*, Issue 2, March 9, 1998; confirmed by May 31, 2001 telephone conversation with Institute for Justice staffer.

105. "NAACP's Parent Trap," *Center-Right*, Issue 2, March 9, 1998; Libertarian Party positions were drawn from the Web site, May 28, 2001.

106. Robert George and William Saunders, "Romer v. Evans: The Supreme Court's Assault on Popular Sovereignty," May 29, 2001.

107. "The Federalist Society and the Challenge to a Democratic Jurisprudence," Institute for Democracy Studies, January 2001, pp. 31.

108. ibid, pp. 18-19.

109. ibid, pp. 17-19.

110. "Who Are We?" Federalist Society Web site, May 30, 2001.

111. Text of a February 24, 1997, letter from U.S. Senator Orrin Hatch to his colleagues on the Senate Judiciary Committee.

112. Text of a speech delivered on February 18, 1997, by U.S. Senator Orrin Hatch to the Federalist Society chapter at University of Utah Law School.

113. ibid.

114. "The Federalist Society and the Challenge to a Democratic Jurisprudence," Institute for Democracy Studies, January 2001, p. 19.

115. ibid, pp.19-20.

116. Nadine Strossen, "A Constitutional Litmus Test," American Prospect, June 23, 1993. Strossen quotes a 1985 *Newsweek* article that described the powerful role of Grover Rees III who screened "potential nominees for ideological irregularity"; "The Federalist Society and the Challenge to a Democratic Jurisprudence," Institute for Democracy Studies, January 2001, p. 3, describes the role of Federalist Society co-founder Lee Liberman Otis who screened candidates for the federal courts under President George H. W. Bush.

117. Roger J. Miner, "Remark: Advise And Consent in Theory and Practice," *The American University Law Review*, Summer 1992, 41 Am. U.L. Rev. 1075.

118. "The Federalist Society and the Challenge to a Democratic Jurisprudence," Institute for Democracy Studies, January 2001, p. 13.

119. Edward Lazarus, *Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court* (New York: Penguin Books), 1999, p.264.

120. "A Battle for the Courts," *The New York Times*, May 11, 2001.

121. Robert George and William Saunders, "Romer v. Evans: The Supreme Court's Assault on Popular Sovereignty,", May 29, 2001.

122. Denis Steven Rutkus, "Judicial Nominations by President Clinton During the 103rd-106th Congresses," Congressional Research Service, Report Updated on February 21, 2001.

123. Linda Greenhouse, "The Court and the Triumph of Discord," *The New York Times*, July 15, 2001.

124. Tamar Lewin, "3 Conservative Foundations Are in the Throes of Change," *The New York Times*, May 20, 2001.

125. Neil A. Lewis, "President Moves Quickly on Judgeships," *The New York Times*, March 11, 2001.

126. ibid.

127. Linda Greenhouse, "The Court and the Triumph of Discord," *The New York Times*, July 15, 2001.

128. See http://www.ncil.org/sutton.htm, accessed July 16, 2001.

129. Robert S. Greenberger, "As Hearings on Judicial Nominees Begin, Senate Panel Reserves Fireworks for Fall," *Wall Street Journal*, July 11, 2001.

130. Michael W. McConnell, "Roe v. Wade at 25: Still Illegitimate," *Wall Street Journal*, January 22, 1998, p. A18; William Glaberson, "In New Senate, New Scrutiny of Judicial Nominees," *The New York Times*, May 30, 2001, p. A18; "The American We Seek: A Statement of Pro-Life Principle and Concern," First Things, May 1996, p.1.

131. "Bush Wants to Place Anti-Separationist Law Professor on Federal Court," *Church and State*, June 2001, p. 15.

132. Texans for Public Justice, "Bush's Judicial Intent: Fake Moderate, Veer Right," *Texas Supreme Court Dollar Docket*, May 10, 2001.

133. *In re Jane Doe*, 19 S.W.3d 346, 366 (Tex. 2000) (Gonzales, J., concurring).

134. "Judge Carolyn Kuhl," fact sheet of the National Abortion and Reproductive Rights Action League (NARAL), accessed July 16, 2001.

135. *Bob Jones University v. U.S.*, 461 U.S. 574 (1983).

136. Jerry M. Landay, "The Conservative Cabal That's Transforming American Law," *Washington Monthly*, March 2000, accessed online July 10, 2001.

137. ibid.

138. Paul M. Barrett, "A Movement Called Law and Economics Sways Legal Circles," *Wall Street Journal*, August 4, 1986, p. 1.

139. Elizabeth A. Palmer, "For Bush's Judicial Nominees: A Tough Tribunal Awaits," *Congressional Quarterly Weekly*, April 28, 2001, p. 898.

140. "Who Are We?", May 30, 2001.

141. "The Federalist Society and the Challenge to a Democratic Jurisprudence,", accessed May 30, 2002, Institute for Democracy Studies, January 2001, pp. 1-32; Timothy Noah, "It's Mid-May. Do You Know Where Dubya's Florida Legal Team Is?" Slate.com, May 16, 2001, file was accessed on June 1, 2001; PR Newswire, December 14, 2000, 3:01 p.m. (New York); "The ABA and Criminal Justice Issues: An Informational Report of the Criminal Law and Procedure Practice Group of the Federalist Society for Law and Public Policy Studies," August 1997, accessed July 12, 2001; Lawyers division, chapter presidents, accessed July 16, 2001; Jerry M. Landay, "The Conservative Cabal That's Transforming American Law," *Washington Monthly*, March 2000, accessed online July 10, 2001; Online Newsroom, National Abortion Rights Action League (NARAL),; List of people recommended by the Federalist Society as "legal experts" on specific topics, accessed June 1, 2001.

142. The *Akron Beacon Journal* has reported that Cook is a member of the Federalist Society, although this is not reflected in Cook's questionnaire responses to the Senate Judiciary

Committee. See "Cooked With Care: The First Batch of Bush Judicial Nominees? The White House Follows the Election Returns," *The Beacon Journal*, May 11, 2001, accessed July 10, 2001.

Copyright © 2001 People For the American Way Foundation
Reprinted for Fair Use Only.